Tentative Rulings for August 31, 2016
Departments 402, 403, 501, 502, 503

There are no tentative rulings for the following cases. The hearing will go forward on these matters. If a person is under a court order to appear, he/she must do so. Otherwise, parties should appear unless they have notified the court that they will submit the matter without an appearance. (See California Rules of Court, rule 3.1304(c).)

16CECG00804 ***Estrada v. Lowery*** **(Dept. 501)**

11CECG04226 ***East v. Comprehensive Educational*** **(Dept. 402)**

The court has continued the following cases. The deadlines for opposition and reply papers will remain the same as for the original hearing date.

11CECG04276 ***Vue v. United Hmong International*** **(Dept. 402) [Hearing on motion for attorney's fees and motion to tax costs is continued to October 6, 2016, at 3:30 p.m. in Dept. 402]**

15CECG02755 ***C.A. Vanderham and Sons Dairy v. J&D Wilson and Sons Dairy*** **(Dept. 502) [Hearing on Applications for Writs of Attachment is continued to September 8, 2016, at 3:30 p.m. in Dept. 502]**

(Tentative Rulings begin at the next page)

Tentative Rulings for Department 402

(2)

Tentative Ruling

Re: ***Carter v. Central Unified School Dist. et al.***
Superior Court Case No. 14CECG03916

Hearing Date: August 31, 2016 (Dept. 402)

Motion: Petition to Compromise Minor's Claim

Tentative Ruling:

To grant. Order signed. Hearing off calendar.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/30/16.
(Judge's initials) (Date)

(20) **Tentative Ruling**

Re: ***Rodriguez v. Wells Fargo Home Mortgage***, Superior Court Case No. 15CECG03854

Hearing Date: **August 31, 2016 (Dept. 402)**

Motion: Defendant's Motion for Judgment on the Pleadings

Tentative Ruling:

To grant the motion as to the first, third and fourth causes of action, with plaintiff granted 10 days' leave to amend as to the first and fourth causes of action only. (Code Civ. Proc. § 438(c)(1)(B)(ii).) The time in which the complaint can be amended will run from service of by the clerk of the minute order. All new allegations in the first amended complaint are to be set in **boldface** type.

Explanation:

The court first notes that the motion is not granted on the ground of failure to join an indispensable party. This is not a ground for judgment on the pleadings. (See Code Civ. Proc. §§ 430.80, 438(c)(1)(B).)

The motion is granted as to the first cause of action for violation of Business and Professions Code § 17200. The one allegation that would seem to possibly support a UCL claim is the allegation that Wells Fargo violated the dual-tracking prohibition. Civil Code § 2923.6 provides in pertinent part:

> If a borrower submits a complete application for a first lien loan modification offered by, or through, the borrower's mortgage servicer, mortgagee, trustee, beneficiary, or authorized agent shall not record a notice of default or notice of sale, or conduct a trustee's sale, while the complete first lien loan modification application is pending.

(Civ. Code § 2923.6(c).)

However, plaintiff does not clearly allege that he submitted a complete loan application. Nor does the Complaint include any dates, such that it is clear that the notice of default or of trustee's sale were sent or recorded after the submission of a complete application.

Additionally, the Complaint odes not plead entitlement to any remedies available for violation of section 17200. The UCL "limits the remedies available for violations to restitution and injunctive relief … " (*Madrid v. Perot Systems Corp.* (2005) 130 Cal.App.4th 440, 452.) "[I]ndividuals may not recover damages" under the UCL. (*Korea Supply Co. v. Lockheed Martin Corp.* (2003) 29 Cal.4th 1144, 1150.)

The complaint seeks damages and restitution, but no injunctive relief. Restitution is not available because plaintiff does not allege that any moneys paid by him were

wrongfully obtained by Wells Fargo. For restitution to be available, the "offending party must have obtained something to which it was not entitled and the victim must have given up something which he or she was entitled to keep." (*Day v. AT&T Corp.* (1998) 63 Ca1.App.4th 325, 340.) The opposition to the motion argues that "[i]t is precisely because of Defendants' fraudulent business practices that Plaintiff suffered injury in the form of losing money paying on the loan that was grossly misrepresented and initiation of the foreclosure proceedings which could lead to the loss of the Property." Since the only moneys allegedly lost were the payments plaintiff made under the loan, plaintiff has not alleged any loss or payment to Wells Fargo that it was not entitled to. Accordingly, there is nothing to restore to plaintiff.

Wells Fargo contends that the second cause of action fails to state sufficient facts to allege breach of the implied covenant of good faith and fair dealing because the Complaint fails to identify an express provision of the loan contract that was violated by Wells Fargo's conduct. However, that is the standard for a breach of contract claim, not breach of the implied covenant. Wells Fargo produces no authority that the implied covenant is only breached if an express provision of the contract is breached. If that were the case, there would be no distinction between the two causes of action.

The motion should be granted as to the third cause of action for breach of fiduciary duty, without leave to amend, because a lender is not a fiduciary to a borrower. (See *Nymark v. Heart Fed. Sav. & Loan Ass'n* (1991) 231 Cal.App.3d 1089, 1093 n.1.)

The motion is granted as to the fourth cause of action for fraud because the cause of action is not pled with the required specificity.

The elements of fraud are: (1) a material representation or deceit that is false; (2) knowledge of falsity; (3) intent to defraud; (4) justifiable reliance; and (5) resulting damages. (*Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 363.) Fraud claims must also be pled with specificity. (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1331.) "[E]very element of the cause of action for fraud must be alleged in full, factually and specifically, and the policy of liberal construction of pleading will not usually be invoked to sustain a pleading that is defective in any material respect." (Id.) "The requirement of specificity in a fraud action against a corporation requires the plaintiff to allege the names of the persons who made the allegedly fraudulent representations, their authority to speak, to whom they spoke, what they said or wrote, and when it was said or written." (*Tarmann v. State Farm Mut. Auto. Ins. Co.* (1991) 2 Cal.App.4th 153, 157.) In other words, Plaintiffs must "show how, when, where, to whom, and by what means the [mis]representations were tendered." (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 645.)

The Complaint contains none of these specifics as to any of the alleged misrepresentations. Nor has plaintiff specifically alleged what damages he has suffered. Plaintiff merely alleges that he has suffered "economic damages," including loss of equity in the property. (Complaint ¶ 87.) Records subject to judicial notice show that plaintiff defaulted on the loan in June 2012 (RJN Exh. 5). Due to the lack of detail in

the Complaint, it is not clear whether plaintiff defaulted before or after seeking out a loan modification. The Complaint does not show that plaintiff suffered damages as a result of any misrepresentations by Wells Fargo.

Pursuant to Cal. Rules of Court, Rule 3.1312(a) and Code Civ. Proc. § 1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: JYH on 08/30/16.
(Judge's initials) (Date)

Tentative Rulings for Department 403

(28) **Tentative Ruling**

Re: **Sameer v. Moreno, et al.**

Case No. 15CECG00351

Hearing Date: August 31, 2016 (Dept. 403)

Motion: By Plaintiff to Set Aside Orders on Attorney Fee Pursuant to the September 23, 2015 hearing.

Tentative Ruling:

To deny the motion.

Explanation:

Plaintiff Madhu Sameer moves to set aside an award of $8,813.75 in attorney's fees entered on September 23, 2015. Plaintiff argues that because she was not in Court to defend herself, the Court changed its tentative from $198 to over $8,813.75, and because of that and other issues, the Court should set aside the order.

Her absence was caused, she alleges, by Defendant's purposefully scheduling the hearing at a time when she was unable to attend, that retained counsel did not represent her competently, and that the claim was the result of billing fraud. According to the Points and Authorities, the motion is made on the grounds of California Code of Civil Procedure §§473, subdivisions (a)-(d), 473.1 and 475 and Federal Rule of Civil Procedure 60, subdivision (b). [The Court should note that Federal Rule of Civil Procedure has no application in California Courts.]

Defendant challenges all of Plaintiff's substantive claims and also asserts that the motion is untimely, since it should have been brought within six months of issuance of the September 23, 2015 order.

A party may seek discretionary relief from a judgment within 6 months after entry pursuant to Code of Civil Procedure §473, subdivision (b) on the grounds of mistake, inadvertence, surprise, or excusable neglect. Here, Defendant contends that, because the order was entered on September 23, 2015, the time in which to file a challenge to the order has long since passed.

Generally, any post-judgment order awarding or denying costs and/or attorney fees is separately appealable under Code of Civil Procedure §904.1 from the judgment itself. (*See Apex LLC v. Korusfood.com* (2013) 222 Cal.App.4th 1010, 1015.) The appeal filed by Plaintiff on October 15, 2015 was from the order dated July 2, 2015, and not

from the attorney's fees order of September 23, 2015. Therefore, there appears to be no applicable tolling of the time in which to bring such a motion. Therefore, any recourse to Section 473, subdivision (b) is unavailable to Plaintiff.

A party may bring a motion for relief within two years of a proceeding on the grounds of lack of notice pursuant to Code of Civil Procedure §473.5. However, Plaintiff was provided with notice as evidenced by the filing of an opposition. Further, this Court has already ruled on this issue in its September 23, 2015 order. Plaintiff had notice, whether through service on the clerk, mail service on Plaintiff's place of residence, or actual notice as evidenced by the filing of the opposition. (*Leverett v. Superior Court* (1963) 222 Cal.App.2d 126, 134-35; *Ramos v. Homeward Residential, Inc.* (2014) 223 Cal.App.4th 1434, 1444-45 (relief pursuant to section 473.5 available only where no actual notice occurred).)

Finally, Plaintiff asserts that it is entitled to equitable relief on the grounds of extrinsic fraud or mistake. A court may provide relief from any judgment at any time on the grounds of "extrinsic fraud or mistake," a term that applies "when circumstances extrinsic to the litigation have unfairly cost a party a hearing on the merits." (*Rappleya v. Campbell* (1994) 8 Cal.4th 975, 981.) "Relief on the ground of extrinsic fraud or mistake is not available to a party if that party has been given notice of an action yet fails to appear, without having been prevented from participating in the action." (*Cruz v. Fagor America, Inc.* (2007) 146 Cal.App.4th 488, 503.)

Implicit in these cases is that a moving party must show a satisfactory excuse for failing to defend in the action and must have been diligent in pursuing relief. (*Cruz, supra,* 146 Cal.App.4th at 503-504.)

Here, Plaintiff has argued that she was unavailable to appear at the time of the hearing scheduled by Defendant. Defendant does not contest this in his opposition, nor does either party cite to any case law on this specific point.

It is the case that there is an obligation by members of the State Bar to respect the legitimate interests of other parties and the administration of justice. (*Tenderloin Housing Clinic, Inc. v. Sparks* (1992) 8 Cal.App.4th 299, 306.) *Tenderloin Housing Clinic* found that sanctions were warranted when a party had specifically scheduled discovery responses for a time when the opposing party knew they were unavailable, among other transgressions. (*Id.*) The *Tenderloin* Court observed that "even if a legal step taken or legal procedure pursued has justification in law, the timing thereof may be oppressive and may constitute harassment if it unjustifiably neglects or ignores the legitimate interest of a fellow attorney." (*Id.*)

According to the evidence produced by Plaintiff, she sent an e-mail to an employee of Defendant's counsel indicating that she would be unavailable between June 15, 2015 and August 30, 2015. (Exh. 4 to motion.) Defendant filed their anti-SLAPP motion for a hearing date of September 23, 2015. Therefore, although allowing for more time to prepare to oppose the motion may have been more civil, it cannot be said it was *oppressive* to schedule the hearing for three weeks after Plaintiff's notice of unavailability was finished. The record does not indicate that Plaintiff sought a

continuance from either the Court or an opposing party. As a result, it cannot be said that Plaintiff's unavailability was the cause or result of "extrinsic fraud or mistake."

Plaintiff claims that service was improper thus depriving her of legal notice of the motion. She contends that as a resident of Fresno, California at the time of the motions, the proper service should have been at her address in Fresno. The proofs of service attached to both the Motion for Attorney's fees and the Anti-SLAPP motion appear to indicate that they were served at the Fresno, California address.

Plaintiff further claims that her lack of an attorney caused her "mistake or surprise." Plaintiff provides what appears to be a signed substitution of attorney form. (Exhibit 8 to Declaration of Sameer.) It is true that the failure of an attorney to adequately represent a client may be ground for equitable relief from a judgment. (*People v. One Parcel of Land* (1991) 235 Cal.App.3d 579, 584.) However, Plaintiff has provided no foundation as to this document and why it was not filed. Absent such an evidentiary foundation, the Court cannot rule on this ground.

Plaintiff finally claims that the attorney's fees award was "excessive" or obtained through fraud, and are therefore void or voidable. Here, there is nothing in the record to indicate that Plaintiff was prevented from attending the hearing on September 23, 2015. Furthermore, the amount awarded for attorney's fees is within the Court's discretion. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 785.) Plaintiff's arguments regarding whether the fees awarded was reasonable is probably better directed to an appeals court.

Finally, even if the Court were inclined to grant this motion, Plaintiff has not shown any diligence in bringing the motion. (*Cruz, supra,* 146 Cal.App.4th at 503-504.) The order granting the motion for attorney's fees was issued by the Court on September 23, 2015. There is no explanation for why Plaintiff waited until August 1, 2016 to bring the motion. This is a separate and independent reason to deny the motion.

For all these reasons, the motion is denied.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: KCK on 08/29/16.
(Judge's initials) (Date)

Tentative Rulings for Department 501

03

Tentative Ruling

Re: ***Citibank v. Kozlowski***
Case No. 15 CE CG 01042

Hearing Date: August 31st, 2016 (Dept. 501)

Motion: Receiver's Motion to Approve and Settle Receiver's First Interim Account and Fee Application

Tentative Ruling:

To grant the motion to approve and settle the receiver's first interim account and fee application.

Explanation:

The receiver has provided detailed reports of the receipts and expenses of the receivership estate, which indicate that the property is currently running a profit of about $59,000. Therefore, the court intends to find that the receiver's first interim account is reasonable and accurate, and it will approve the account.

Also, the receiver's requested fees of $22,410.30 appear to be fair and reasonable, especially since the receiver successfully managed the property despite the lack of cooperation of defendant Eric Kozlowski, who refused to turn over the books and records of the property and concealed the fact that he had received an advance payment of rent and utilities from one of the property's largest tenants, Producers Dairy Foods. While defendants' attorney previously objected to the receiver's proposed fees, he has not filed any opposition to the present application, so it appears that defendants no longer have any objection to the amount of the requested fees. In any event, considering that many of the fees were incurred because defendant refused to cooperate with the receiver, it does not appear that defendant has any valid basis for objecting to the amount of the receiver's fees now.

Therefore, the court intends to approve the receiver's first interim account and grant the fee application.

Pursuant to CRC 3.1312 and CCP §1019.5(a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: MWS on 08/30/16.
(Judge's Initials) (Date)

Tentative Rulings for Department 502

(24) **Tentative Ruling**

Re: ***Quality Spruce Properties, LLC v. Sierra Community Center***
Court Case No. 15CECG01387

Hearing Date: **August 31, 2016 (Dept. 502)**

Motion: Defendant Sierra Community Center's Demurrer to Second Amended Complaint

Tentative Ruling:

To sustain with leave to amend. Plaintiff is granted 30 days' leave to amend during which time it must meet and confer concerning the amended complaint before a Third Amended Complaint is filed. (Code Civ. Proc., § 430.41, subd. (c).) The time in which the complaint can be amended will run from service by the clerk of the minute order. All new allegations in the second amended complaint are to be set in **boldface** type.

Explanation:

Defendant's argument that this cause of action seeks only retroactive relief is based on the claim that the parties arrived at the alleged uncertainty over their various rights and duties as a result of a mistake by Plaintiff in failing to condition the sale on mutual easements. Under this logic, if the parking lot encroachment issue had not been discovered until successive owners owned each property (for example, if the property survey had been done by a new owner of defendant's property, at a time when someone else owned plaintiff's property), *then* a declaratory relief action would be available. But it is not available now only because plaintiff (as it has alleged) did not know there was an encroachment issue and thus failed to understand that enforcing the mutually binding covenants at the time of sale was necessary. This logic is unpersuasive.

As the court stated in its earlier Tentative Ruling, plaintiff is able to allege a cause of action for declaratory relief as a way to determine the rights and responsibilities of the parties in relation to the recorded Covenant. (Code Civ. Proc. § 1060. See *Hess v. Country Club Park* (1931) 213 Cal. 613, 614—use of declaratory relief statute to determine validity and binding effect of equitable servitude. See also *Marden v. Bailard* (1954) 124 Cal.App.2d 458, 464—cause of action for declaratory relief stated regarding rights under grant deed, and the effect of building restrictions.) To allege such a cause of action, plaintiff need only allege a proper subject of declaratory relief within the scope of Code of Civil Procedure section 1060 and an actual controversy involving justiciable questions relating to the rights or obligations of a party. (*Hess v. Country Club Park, supra*; *City of Tiburon v. Northwestern Pac. R. Co.* (1970) 4 Cal.App.3d 160, 170.)

In the case of *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, plaintiffs (Mr. and Mrs. Tashakori) brought a claim for "equitable easement" where their cause of action was directed to the goal of "obtaining a right of passage over the defendants' properties to allow for ingress and egress" to their property over a shared driveway. (*Id.* at p. 1012.) Without this relief, their property was landlocked as a result of their sale of the adjoining property now owned by the defendants (Mr. and Mrs. Lakis). (*Id.* at p. 1006.) The court found that this cause of action was "properly construed as a request for *declaratory relief*," with the primary right underlying their equitable easement claim being defendants' alleged right to exclusive possession of their property with the supposed "wrongdoing" being plaintiffs' breach of this property right. (*Id.* at p. 1011, emphasis in the original.) The court recognized that the finding sought by plaintiffs was that, notwithstanding defendants' property rights, plaintiffs were equitably entitled to continue to access defendants' property. (*Id.*) The court concluded the complaint "adequately raises a justiciable issue as to whether the Tashakoris are entitled to an equitable easement." (*Id.* at p. 1012; see also *Donnell v. Bisso Brothers* (1970) 10 Cal.App.3d 38, 45—plaintiff's suit for injunctive relief was sufficient to encompass request for an equitable easement.)

The court also found there was an "actual controversy" simply due to the fact that defendants had maintained that plaintiffs' act of using the driveway constituted trespass (as have defendants here), and the mere threat of a lawsuit on this score "can satisfy the actual controversy requirement for a declaratory relief action." (*Tashakori v. Lakis, supra*, 196 Cal.App.4th at 1012-1013.) Here, defendant not only maintains that the parking lot constitutes a trespass, but it has stated this cause of action against plaintiff in its cross-complaint. The parties have an actual controversy.

For these reasons, in ruling on the demurrer to the First Amended Complaint this court sustained the demurrer to the specific performance cause of action and gave leave to amend under the direction that plaintiff could state a cause of action for declaratory relief under an implied easement theory. The problem with plaintiff's current iteration of this cause of action is that it is not seeking the relief under an *implied easement* theory, but instead has simply reframed its specific performance cause of action as one for declaratory relief. That was not the court's order, or intent. Thus, the Second Amended Complaint is subject to demurrer, but leave to amend is allowed to properly state this cause of action.

An easement will be implied when, at the time the property was conveyed, the following conditions exist: 1) the owner of property conveys a portion of that property to another; 2) the owner made an existing use of the property, the nature of which indicates the parties must have intended or believed that this use would continue; i.e., that the existing use was either known to the party sought to be bound (here, defendant), or was so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the party seeking to enforce the implied easement (here, plaintiff). (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406.)

Facts supporting these elements have been alleged: 1) plaintiff conveyed a parcel of property to defendant, on a portion of which lay plaintiff's parking lot; 2)

plaintiff made an existing use of the parking lot, and due to the nature of this use it reasonably assumed, for purposes of demurrer, that the parties must have intended or believed that use would continue (plaintiff alleges neither party knew of the encroachment and both believed the parking lot was entirely on plaintiff's property), and furthermore a parking lot is in the nature of a permanent use; 3) the easement is reasonably necessary to the use and benefit of plaintiff. But instead of seeking a finding, as did the plaintiffs in *Tashakori v. Lakis*, that plaintiffs are allowed to continue to access defendant's property, they seek "declaratory relief that Plaintiff and Defendant are to enter into an easement agreement" which is seeking an *express* easement. Again, this seeks specific performance of a term not in the parties' sales contract. This is not requesting an *implied easement*, as the earlier leave to amend directed.

Pursuant to California Rules of Court, rule 3.1312 and Code of Civil Procedure section 1019.5(a), no further written order is necessary. The minute order adopting this ruling will serve as the order of the court, and service by the clerk of the minute order will constitute notice of the order.

Tentative Ruling

Issued By: DSB on 08/30/16.
(Judge's Initials) (Date)

Tentative Rulings for Department 503

(19) **Tentative Ruling**

Re: ***Negrete-Dabbs v. Fenglaly***
Court Case No. 16CECG00309

Hearing Date: August 31, 2016 (Department 503)

Motion: demurrer by defendants to First Amended Complaint

Tentative Ruling:

To overrule and require an answer in 10 days.

Explanation:

The demurrer itself lists only a demurrer on the grounds that the facts are insufficient to state a cause of action. Although the points and authorities discuss a special demurrer for uncertainty, none is found in the demurrer and the Court does not consider such ground for that reason.

Code of Civil Procedure section 340.5 states, in part:

> "In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of action shall be three years after the date of injury or one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury, whichever occurs first. In no event shall the time for commencement of legal action exceed three years unless tolled for any of the following: (1) upon proof of fraud, (2) intentional concealment, or (3) the presence of a foreign body, which has no therapeutic or diagnostic purpose or effect, in the person of the injured person."

It appears that defendants are urging that the specificity required for pleading a cause of action for fraud should also apply to pleading an exception to the bar of the statute of limitations. However, the Court has found no case that calls for imposition of the fraud claim specificity standards on pleading an exception found in Code of Civil Procedure section 340.5. Code of Civil Procedure section 364 requires specificity in the notice to the physician of a coming lawsuit, but that term is not found in Code of Civil Procedure section 340.5.

The pleading states that the health care provider falsely represented to plaintiffs that the coils were in place in the fallopian tubes, that he falsely represented Negrete-

Dabbs was "fine," and that he attributed her pain to menstruation, when in fact the coils were embedded in her uterine wall and the health care provider had improperly reversed the order of procedures when treating plaintiff.

"Since direct proof of fraudulent intent is often impossible, the intent may be established by reference from the acts of the party." *Delos v. Farmers Ins. Group, Inc.* (1979) 93 Cal. App. 3d 642, 658. "The law is established in California that, since direct proof of fraudulent intent is often an impossibility, because the real intent of the parties and the facts of a fraudulent transaction are peculiarly in the knowledge of those sought to be charged with fraud, proof indicative of fraud may come by inference from circumstances surrounding the transaction, the relationship, and interest of the parties." *Miller v. National American Life Ins. Co.* (1976) 54 Cal. App. 3d 331, 338.

The circumstances alleged here are sufficient to infer intentional concealment for pleading purposes.

Pursuant to Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/30/16.
(Judge's initials) (Date)

(6)

Tentative Ruling

Re: ***Saint Agnes Medical Center v. Santé Community Physicians IPA Medical Corporation***
Superior Court Case No.: 13CECG03308

Hearing Date: August 31, 2016 (**Dept. 503**)

Motions: (1) By Defendant/Cross Complainant Santé Community Physicians IPA Medical Corporation to vacate September 1, 2015, pretrial discovery conference law and motion minute order;

(2) By Plaintiff/Cross Defendant Saint Agnes Medical Center to compel Defendant Santé Community Physicians IPA Medical Corporation's further responses to demands for inspection (set one)

Tentative Ruling:

To deny both motions.

Explanation:

The motion to compel is untimely. In the Court's March 25, 2016 order on request for pretrial discovery conference, the order provided that the time for filing a motion to compel discovery on the disputed issues was tolled for 90 days. (Fresno County Sup.Ct., Local Rules of Court, rule 2.1.17.) Service of the minute order was made by mail on March 29, 2016. The motion to compel was not served and filed until July 25, 2016, 118 days after service of the minute order, and must be denied as untimely, rendering the motion to vacate the September 1, 2015, pretrial discovery conference law and motion minute order, moot.

Pursuant to California Rules of Court, rule 3.1312(a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/30/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***Casillas v. Central California Faculty Medical Group, Inc. dba University North Medical Specialty Center***
Superior Court Case No. 15 CECG 00549

Hearing Date: August 31, 2016 (**Dept. 503**)

Motion: By Defendant for summary judgment, or in the alternative, summary adjudication

Tentative Ruling:

To deny the motion without prejudice.

Explanation:

Purpose of Summary Judgment

Summary judgment law turns on issue *finding* rather than issue *determination*. [*Diep v California Fair Plan Ass'n* (1993) 15 Cal.App.4th 1205, 1207.] The court does not decide the merits of the issues, but merely discovers, through the medium of affidavits or declarations, whether there are issues to be tried and whether the parties possess evidence that demands the analysis of a trial. [*Melamed v City of Long Beach* (1993) 15 Cal.App.4th 70, 76; *Molko v Holy Spirit Ass'n* (1988) 46 Cal.3d 1092, 1107; *Schwoerer v Union Oil Co*. (1993) 14 Cal.App.4th 103, 110.] In short, the motion is not a substitute for a bench trial.

Role of Pleadings in Summary Judgment

A summary judgment motion must show that the **"*material* facts"** are undisputed (CCP § 437c(b)(1)). The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. [*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1258; *Nieto v. Blue Shield of Calif. Life & Health Ins. Co*. (2010) 181 Cal.App.4th 60, 74—"the pleadings determine the scope of relevant issues on a summary judgment motion"]

Requirements for Separate Statements

A party moving for summary judgment or summary adjudication must support the motion with a separate statement that sets forth plainly and concisely all material facts that the moving party contends are undisputed, and each of these material facts must be followed by a reference to the supporting evidence. [CCP §437c(b)(1), (f)(2).] A separate statement is required to afford due process to the opposing party and to permit the judge to expeditiously review the motion for summary judgment or summary adjudication to determine quickly and efficiently whether material facts are disputed.

[*Parkview Villas Ass'n, Inc. v State Farm Fire & Cas. Co*. (2005) 133 Cal.App.4th 1197, 1210; *United Community Church v Garcin* (1991) 231 Cal.App.3d 327, 335.] As a result, the separate statement should include only *material* facts—ones that could make a difference to the disposition of the motion. [CRC 3.1350(f)(3); see also CRC 3.1350(a)(2) (defining "material facts")]

As a result, the moving party must go through its own case **and** the opposing party's case on an issue-by-issue basis. The moving party must identify for the court the matters it contends are "undisputed," and cite the specific evidence (pleadings admissions, or discovery, or declarations) showing there is no controversy as to such matters and that the moving party is entitled to judgment as a matter of law. "This is the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, *it does not exist*." [*United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337; *Allen v. Smith* (2002) 94 Cal.App.4th 1270, 1282; *Teselle v. McLoughlin* (2009) 173 Cal.App.4th 156, 173—failure of defendant's separate statement to address material allegation in complaint was "fatal flaw"]

The case of *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 is particularly instructive. Each material fact **should be stated separately** rather than set forth with several other facts. This permits the court to see easily how the fact is supported by the cited evidence. Include only those facts which are ***truly material*** to the claims or defenses involved because the separate statement effectively *concedes* the materiality of whatever facts are included. Thus, if a triable issue is raised as to any of the facts in your separate statement, the motion may be denied. [*Nazir v. United Airlines, Inc.*, supra, 178 Cal.App.4th at 252.] Moreover, the court has the *inherent power to strike* proposed undisputed facts "that impede the ability of the court to determine whether the case presents triable material issues of fact." Id. at 290.

On a motion for **summary adjudication**, the statement **must** also tie each "undisputed material fact" to the particular claim, defense or issue sought to be adjudicated: "(T)he specific cause of action, affirmative defense, claims for damages, or issues of duty must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement of undisputed material facts." [CRC 3.1350(b). When multiple causes of action, issues or defenses are presented for summary adjudication in one motion, each cause of action, issue or defense to which the motion is directed **must** have a separate section heading indicating the issue number and specifying the issue (CRC 3.1350(d)).

Failure to comply with the separate statement requirement constitutes ground for denial of the motion, in the court's discretion. [CCP § 437c(b)(1); *Reeves v. Safeway Stores, Inc.* (2004) 121 CA4th 95, 106—instead of stating key events as "undisputed facts," defendant stated what witnesses *said* about those events; *Teselle v. McLoughlin* (2009) 173 CA4th 156, 160, 92 CR3d 696, 701—separate statement failed to address allegations of material fact in complaint] If the separate statement fails to indicate *all* necessary facts, the court *need not read* the supporting declarations and other evidentiary documents. [See *Rio Linda Unified School Dist. v. Sup.Ct. (Diaz)* (1997) 52 CA4th 732, 740, 60 CR2d 710, 715]

Motion at Bench

First, many of "undisputed facts" listed in the Defendant's Separate Statement are **not** "material facts" as delineated by the First Amended Complaint and/or the affirmative defenses of the Answer. Instead, many of the "undisputed facts" are simply "evidentiary facts." This is improper. See *Reeves v. Safeway Stores, Inc*., supra, 121 Cal.App.4th at 106.

Second, there was no section of the Separate Statement that addressed the motion for summary judgment standing alone, despite the fact that the motion seeks summary judgment, or in the alternative, summary adjudication. See Notice of Motion at page 2 lines 3-11. Instead, the Separate Statement only addresses the motion for summary adjudication of each cause of action.

Third, the Separate Statement submitted in support of the motion for summary adjudication as to many of the causes of action is not properly formatted as required by CRC 3.1350 given that it incorporates by reference previously listed "undisputed facts." More importantly, many of the "grounds listed" are not directed to the elements of the three causes of action.

Fourth, many of the "undisputed facts" consist of **multiple** facts. This makes it difficult for the Court to determine which fact the Plaintiff's response of "disputed" challenges. In addition, the Plaintiff makes the same mistake as the Defendant and disputes the "material facts" with her own version of events. But, if Plaintiff wanted the Court to be aware of material facts not listed in the Defendant's Separate Statement that are instrumental to defeating the motion, she should have listed them **separately** in her Response to the Separate Statement. See CCP § 437c(b)(3). There is a difference between disputing whether a statement was made or an action taken versus the motive for the statement or the action taken. If the latter, then these facts should be listed separately.

Fifth, in reply, the Defendant submitted a Separate Statement which is essentially a chart listing the Defendant's Separate Statement of "undisputed facts" alongside Plaintiff's response thereto and then Defendant's response to Plaintiff's response. Defendant also submitted new and/or rebuttal evidence attached as Exhibits to the Declaration of Boca. But, the summary judgment statute does *not* provide for a "Reply Separate Statement." Nor are "Exhibits and Evidence in Support of Reply" generally allowed. [*Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 at 249]

Ultimately, the Court is aware that when an employer seeks summary judgment, the initial burden rests with the *employer* to show that no unlawful discrimination occurred. [CCP § 437c(p)(2); see *Guz v. Bechtel Nat'l, Inc.* (2000) 24 Cal.4th 317 at 354-355; *Sandell v. Taylor-Listug, Inc.* (2010) 188 Cal.App.4th 297, 309; *McGrory v. Applied Signal Technology, Inc.* (2013) 212 Cal.App.4th 1510, 1523. The employer must meet its burden of showing the employee's action has no merit (CCP § 437c(p)(2)). It may do so by evidence either:

- *negating* an essential element of the employee's claim; **or**

- showing some *legitimate, nondiscriminatory reason* for the action taken against the employee. [See *Caldwell v. Paramount Unified School Dist.*, supra, 41 CA4th at 202-203, 48 CR2d at 457]

But, this does not relieve the moving party of compliance with the requirements of a proper Separate Statement. As presently submitted, the motion, opposition and reply are simply a "trial on paper." The purpose of the summary judgment procedure is not to provide a substitute for existing methods in the trial of issues of fact. *EHP Glendale v County of Los Angeles* (2011) 193 Cal.App.4th 262, 273. Given that both parties have submitted defective Separate Statements, the motion will be denied without prejudice.

Pursuant to California Rules of Court, Rule 3.1312, subd. (a) and Code of Civil Procedure section 1019.5, subd. (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/29/16.
(Judge's initials) (Date)

(28) **Tentative Ruling**

Re: **Champion Home Builders, Inc. v. CFG Capital, Inc., et al.**

Case No. 15CECG03330

Hearing Date: August 31, 2016 (Dept. 503)

Motion: Order to Show Cause Re: Reclassification to Limited Civil Case

Tentative Ruling:

To reclassify the case as a limited civil matter. The case is ordered transferred to the Limited Civil Department.

Explanation:

The Court set an Order to Show Cause re: Reclassification since it appears from the records that the amount at issue in this interpleader action is $18,000.00. No party has submitted an opposition or any briefing with respect to this matter.

Under Code of Civil Procedure Section 86, subdivision (a)(2) a limited civil case includes "an action of interpleader where the amount of money or the value of the property involved does not exceed twenty-five thousand dollars."

Since the Order to Show Cause was issued, Defendant Anastacio Moreno has filed an answer in which he seeks over $7,500 in costs and fees. Costs and attorney's fees are not considered in determining whether a case is limited or unlimited. (Code Civ.Proc. §85, subd.(a).) Additionally, to the extent that the answer could be interpreted as a cross-complaint for damages, the amount sought is still under the jurisdictional limit. (Code Civ.Proc. §403.030.) Therefore, this matter is reclassified as a limited civil case.

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/30/16.
(Judge's initials) (Date)

(5)

Tentative Ruling

Re: ***AMP Trucking, Inc. v. Narvinder Singh dba Prince Transport***
Superior Court Case No. 15 CECG 01720

Hearing Date: August 31, 2016 **(Dept. 503)**

Motion: Withdraw Deemed Admissions

Tentative Ruling:

To the grant the motion. The RFAs deemed as true against the Defendant will be withdrawn and the Plaintiff may re-serve the RFAs, if desired.

Explanation:

The Law in General

An admission cannot be amended or withdrawn except by leave of court after noticed motion. [CCP § 2033.300(a); see *Valerio v. Andrew Youngquist Const.* (2002) 103 Cal.App.4th 1264, 1272] Admissions serve a function similar to *pleadings* in that they are aimed primarily at setting a triable issue to rest. Thus, like pleadings, leave of court is required before admissions may be amended or withdrawn. [See *Jahn v. Brickey* (1985) 168 Cal.App.3d 399, 404] CCP § 2033.300(a) permits amendment or withdrawal of "deemed admissions" ordered by the court under § 2033.280(b), as well as admissions expressly made by a party. [*Wilcox v. Birtwhistle* (1999) 21 Cal.4th 973, 979]

A party will be permitted to withdraw or amend an admission only if the court finds:

- The admission resulted from "*mistake, inadvertence or excusable neglect*" *and*
- *No substantial prejudice* to the requesting party will result from allowing the admission to be withdrawn or amended. [CCP § 2033.300(b); see *New Albertsons, Inc. v. Sup.Ct. (Shanahan)* (2008) 168 Cal.App.4th 1403, 1418]

The requirements for relief under CCP § 2033.300 are similar to those governing relief from default under CCP § 473(b). The terms "mistake, inadvertence, or excusable neglect" as used in CCP § 2033.300 are given the same meanings as similar terms found in CCP § 473(b). [*New Albertsons, Inc. v. Sup.Ct. (Shanahan)*, supra, 168 Cal.App.4th at 1419] Although the CCP § 2033.300 requirement of "no substantial prejudice" to the party requesting admissions is not express in CCP § 473(b), the "absence of substantial prejudice is an important factor to consider." [*New Albertsons, Inc. v. Sup.Ct. (Shanahan)*, supra, 168 Cal.App.4th at 1420]

CCP § 2033.300 is designed to eliminate undeserved windfalls obtained through requests for admission and to further the policy favoring resolution of lawsuits on the

merits. Therefore, any doubts must be resolved in favor of the party seeking relief. [*New Albertsons, Inc. v. Sup.Ct. (Shanahan)*, supra, 168 Cal.App.4th at 1420] Denial of a motion to withdraw or amend an admission "is limited to circumstances where it is clear that the mistake, inadvertence, or neglect was *inexcusable,* or where it is clear that the withdrawal or amendment would substantially prejudice the party who obtained the admission in maintaining that party's action or defense on the merits." [*New Albertsons, Inc. v. Sup.Ct. (Shanahan)*, supra, 168 Cal.App.4th at 1420-1421 (emphasis added)]

Merits

In the case at bench, the Defendant submits his own Declaration wherein he states that he uses a post office box for his mail. Due to his employment as a long haul trucker, he only checks the box once or twice a month. See ¶¶ 4-5 of the Declaration of Singh. In late July, he learned from his new attorney, Peter Sean Bradley that various documents in connection with this lawsuit had been served on him at the address of the post office box.

As a result, the Defendant made an inquiry at the counter of the post office box company. The woman at the counter told the Defendant that when his post office box "overfills" or they can't get mail into it, they put the excess mail into a box that they keep behind the desk. The woman also told him that after a while, the mail is marked undeliverable and is returned to the sender. Id. at ¶ 6. When the mail behind the counter was searched, there was a large envelope from Plaintiff's attorney consisting of a summary judgment. Defendant states that he did not receive the requests for admission or the motion to deem them established. Id. at ¶ 7.

According to the USPS website, the address where the Defendant receives his mail is a "CPU Postal Station." While this address is affiliated with USPS, it is not an official U.S. Post Office. Notably, the post office boxes are not accessible 24/7. In fact, the store closes early on Saturday and is not open on Sunday. According to the Yelp website, the location is named "The Postal Station & Mobile Page Cellular Accessories Superstore." It is entirely possible that the store would not have handled the mail in the same manner as an official U.S. Post Office.

In light of the foregoing, the Court finds that the Defendant has met the requirements of CCP § 2033.300(b) on grounds of "excusable neglect." The Defendant has shown a reasonable excuse for the failure to respond to the Requests for Admission and for not moving sooner to withdraw them. See *Shapiro v. Clark* (2008) 164 Cal.App.4th 1128, 1141-1142. No prejudice will result to the opposing party. Plaintiff brought its motion for summary judgment on the basis of deemed RFAs. See Declaration of Campagne filed on June 17, 2016. CCP § 2033.300 was enacted to further the policy of resolution of lawsuits on the merits. [*New Albertsons, Inc. v. Sup.Ct. (Shanahan)* (2008) 168 Cal.App.4th 1403 at 1420.

As for the Plaintiff's request for an order requiring the Defendant to pay for the attorney's fees incurred in drafting the motion for summary judgment as well as the filing fee, the statute only authorizes the Court to order the moving party "to bear the costs

of any additional discovery necessitated by the amendment or withdrawal of the moving party's response" or other discovery related costs. [CCP § 2033.300(c)(2)]

Pursuant to California Rules of Court, rule 3.1312, subdivision (a), and Code of Civil Procedure section 1019.5, subdivision (a), no further written order is necessary. The minute order adopting this tentative ruling will serve as the order of the court and service by the clerk will constitute notice of the order.

Tentative Ruling
Issued By: A.M. Simpson on 08/30/16.
(Judge's initials) (Date)